

NEW YORK COURT OF APPEALS ROUNDUP

DEFECTIVE DESIGN, HIPAA, 'BRADY,' AND IMPLIED CONSENT TO MISTRIAL

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This month we discuss a product liability decision in which the Court of Appeals analyzed a defendant's burden at the summary judgment stage in a defective design case, a matter arising under "Kendra's Law," in which the Court declined to adopt expansive interpretations of two exceptions to the Privacy Rule enacted pursuant to the Health Insurance Portability and Accountability Act (HIPAA), and decisions in two criminal cases. In one, the Court rejected the argument that police failure to pursue potentially exculpatory evidence in the course of an investigation constitutes a *Brady* violation. In the other, it upheld a finding that defense counsel, by their silence, gave implied consent to a declaration of a mistrial.

Defective Design

To prevail on a motion for summary judgment in a strict liability case involving a product that is allegedly defectively designed and dangerous to the user, a defendant must do more than file the affirmation of its lawyer acknowledging that its product is inherently dangerous and asserting that such fact is well-known. This is made clear by the Court's decision in *Chow v. Reckitt & Colman Inc.*, a case involving "Lewis Red Devil Lye," a chemical compound known as lye that was sold in the form of dry crystals to be used as directed in clearing clogged drains.

Yun Tung Chow, a restaurant employee, was seriously injured while using Lewis Red Devil Lye to clear a clogged drain in the restaurant's kitchen. He had previously used the product for that purpose without incident. Mr. Chow sued the manufacturer and distributor of the product, claiming both that the product was defectively designed and that the information provided by the defendants failed to adequately warn of the dangers associated with its use. The trial court granted summary judgment for the

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defendants and dismissed both claims. Dismissal of the failure-to-warn claim was unanimously affirmed in the Appellate Division, First Department, and not challenged in the Court of Appeals. Dismissal of the defective design claim was affirmed 3-2, however, and the two-justice dissent from that ruling therefore provided a jurisdictional basis for Mr. Chow's appeal to the Court as of right under CPLR 5601(a).

In the course of its unanimous reversal of dismissal of the defective design claim, the Court acknowledged that Mr. Chow could not read English and had never read the instructions and warnings printed on the product's container, and had used the product in a manner contrary to the instructions, which advised users to wear protective safety eyewear and rubber gloves. Chief Judge Jonathan Lippman's opinion for the Court stated, however, that the adequacy of a product's warnings, even when coupled with a user's failure to read or follow them, does not "end the inquiry with respect to a defective design claim."

The Court referred to its definition of a defectively designed product found in its opinion in *Voss v. Black & Decker Manufacturing Co.*, 59 N.Y.2d 102, 107 (1983): "one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use." The Court also referred to a core principle outlined in *Voss*, 59 N.Y.2d at 107, namely that the "utility" of a product "must outweigh the danger inherent in its introduction into the stream of commerce," *id.*, which is generally a question for the jury.

The Court concluded that, in the summary judgment context, neither the moving attorney's affirmation's discussion of the inherent danger in the use of lye nor Mr. Chow's mishandling of the product shifted the burden to Mr. Chow to demonstrate how the product could be made safer. Nor did they establish that Mr. Chow's conduct was the sole proximate cause of his injuries. Indeed, the finder of fact could conclude that the product was so inherently dangerous that it should not be on the market at all as packaged.

In reversing the Appellate Division, the Court observed that the defendants may ultimately prevail on the merits by showing through expert testimony that it was not feasible to design a safer alternative product that would be effective and reasonably priced, thus meeting the risk-utility test set forth in *Voss*.

Judge Robert S. Smith authored a concurrence to emphasize that the Court's reversal did not reflect upon the ultimate merit of Mr. Chow's case. Rather, it was a function of the requirements of New York's procedural law to justify a grant of summary judgment that, unlike federal law, imposes the burden of proof upon the moving party regardless of whether it will bear the burden of proof on an issue at trial.

HIPAA

The Privacy Rule adopted by the U.S. Department of Health and Human Services pursuant to HIPAA preempts §33.13(c)(12) of the Mental Hygiene Law, the Court ruled in *Matter of Miguel M. v. Barron*. Pursuant to the Mental Hygiene Law, a public official or his designee seeking to require assisted outpatient treatment (AOT) for a mentally ill person is permitted to obtain that person's medical records without his consent or even knowledge. The Privacy Rule's more stringent requirements must be followed, however. As a result, medical records can only be disclosed for purposes of an AOT proceeding if the patient has authorized the disclosure or received notice of the official's request.

Miguel M. was ordered to accept six months of AOT pursuant to Mental Hygiene Law §9.60, known as "Kendra's Law," which under certain circumstances permits courts to compel a mentally ill individual to participate in outpatient treatment. At the hearing on the petition for an AOT order, counsel for Miguel M. objected to the introduction into evidence of expert testimony by a psychiatrist that was based in part upon a review of hospital records. The expert explained that his office obtained the records by merely requesting them from the hospitals. Counsel's objections were overruled, the records were admitted, and the expert testified that Miguel M. suffered from schizoaffective disorder and had twice over the previous three years been hospitalized as a result of his failure to comply with treatment plans, which is a prerequisite to an AOT.

Petitioner sought to justify the release of Miguel M.'s hospital records without obtaining consent or giving him notice by invoking two exceptions to the Privacy Rule. In both instances, the unanimous Court rejected petitioner's strained reading of the literal wording of the exceptions. Instead, it interpreted the language in accordance with the apparent purpose of each.

Petitioner first argued for an expansive interpretation of the "public health" exception, 45 C.F.R. §164.512(b)(1)(i). However, the Court found, this exception is intended to facilitate government authorities' efforts to combat epidemics and similar problems by allowing them to gather statistics on large numbers of people, and not to permit the government to gain access to the details of a particular person's treatment. Next, petitioner attempted to invoke the "treatment" exception, 45 C.F.R. §164.506(c)(2). The Court determined that the "treatment" exception also serves a specific purpose, namely to facilitate the sharing of information among health care providers working together, and not to facilitate the provision of services over a patient's objection.

Judge Smith's opinion for the Court noted that there is an exception to the Privacy Rule applicable to judicial and administrative proceedings, providing further support for the conclusion that the exceptions petitioner relied upon were inapplicable to the

circumstances in this case. The relevant exception, 45 C.F.R. §164.512 (e)(1)(i), permits the disclosure of health information pursuant to a subpoena, discovery request or "other lawful process," conditioned on "satisfactory assurance" from the person seeking the information that either reasonable efforts were made to give the patient notice or an order protecting the confidentiality of the information had been sought. Compliance with the requirements of this exception would have provided Miguel M. with notice and an opportunity to object. While there may be no valid grounds for a patient to object to the disclosure of medical records in a case such as this, the Court observed that there also is no valid reason for not providing the patient with notice.

No 'Brady' Violation

It is a common tactic in criminal trials for the defense to attack the police investigation. In *People v. Kenneth Hayes*, defense counsel sought to introduce into evidence exculpatory statements of eyewitnesses made at the crime scene in order to fault the police for failing to interview those individuals. The defense further argued that the failure to pursue this avenue for potentially exculpatory evidence constituted a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), which established a due process right to be provided with material information favorable to the defense. In a 6-1 decision, the Court upheld the exclusion of the eyewitness statements from evidence and rejected the *Brady* argument.

The victim in *Hayes* was stabbed in a Times Square movie theater during an altercation with defendant. The prosecution contended that defendant had pulled the knife on the victim. The defense contended that the victim had pulled the knife, defendant wrestled it away from him and the victim was accidentally injured as the fight continued.

Several police officers arrived at the theater. Sergeant Fitzpatrick was directed to secure the crime scene, while other officers were dispatched to control the crowd, gather evidence or interview witnesses. Sergeant Fitzpatrick overheard two members of the crowd comment that the victim had the knife first. He did not interview or obtain contact information for those individuals. When the prosecutor learned of these witnesses' comments during trial preparation, he promptly informed the defense.

Defense counsel sought to introduce the hearsay statements of the unidentified crowd members in support of a justification defense, arguing that they were relevant to the adequacy of the police investigation. The trial court ruled that counsel could not use the anonymous statements during cross-examination due to the risk that the jury would improperly consider the hearsay for its truth.

"[A] criminal defendant does not have an unfettered right to challenge the adequacy of the police investigation by any means available," including circumventing the rules of

evidence, Judge Theodore T. Jones wrote in his opinion for the majority. The Court rejected the argument that exclusion of this hearsay constituted an abuse of discretion.

Chief Judge Jonathan Lippman disagreed with the majority on this issue, writing: "a trial judge has no discretion to cut off a legally permissible, non-collateral, indeed potentially exculpatory, line of inquiry by a criminal defendant."

In rejecting the more creative argument, the Court reasoned that to adopt the defense position would essentially impose upon the police a duty to obtain potentially exculpatory evidence on behalf of a defendant. There is no basis under *Brady* or otherwise to create such a duty, the Court held.

Implied Consent to Mistrial

The importance of making a clear and timely objection to the declaration of a mistrial is illustrated by the Court's decision in *Matter of Marte v. Berkman*.

Shortly before noon on the second day of deliberations in a criminal trial—a Friday—the jury sent out a note stating that it had reached a verdict on one count, was close to a decision on a second, but was evenly divided and at an impasse on the remaining counts. Two of the jurors wished to conclude deliberations that day due to personal engagements they had scheduled the following week. The court gave the jury a modified *Allen* charge¹ and sent the jury out to deliberate further at approximately 12:30 p.m. The jury sent out requests for evidence and legal instructions as late as 3 p.m. Later in the afternoon, the jury sent out a note that it had reached a verdict on two of the counts but was again at an "impasse" with respect to the remaining ones.

During an *O'Rama* conference² concerning how it would respond to the note, the court expressed its inclination to take a partial verdict and declare a mistrial on the remaining counts. When the court asked two defense lawyers whether they wanted to be heard on the matter, one responded "no," and the other remained silent. The jury was then called into the courtroom. In giving the partial verdict on two counts, the foreman stated that the jury was "undecided" as to the remaining counts. The court did not inquire whether further deliberations might be productive or whether the jury was willing to work past 5 p.m. It did ask the defense lawyers whether there was anything they wanted to put on the record. When they did not respond, the court declared a mistrial on the remaining counts. After the jurors had been discharged, but before they left the courthouse, defense counsel objected to the mistrial.

The Court, in a memorandum opinion, stated that while express consent to a mistrial is preferable, consent may be inferred in appropriate circumstances. Defendants argued that to declare a mistrial despite their post-discharge objection constituted error as a matter of law. The Court disagreed. Instead, the issue of whether defendants had given

implied consent was a factual one. As a result, the determination of the Appellate Division on that question could not be overturned if there was any support in the record for it. The Court found ample support, as defense counsel was twice given the opportunity to object to a mistrial before the jury was discharged, and neither time lodged an objection, and did indicate during the *O'Rama* conference that they might raise an objection after hearing the colloquy between the judge and jurors when the partial verdict was taken.

Judge Carmen Beauchamp Ciparick, joined by Chief Judge Lippman, dissented. The dissent argued that a mistrial is improper unless a jury is "hopelessly deadlocked." However, the trial judge did not take the steps necessary to establish that was the case here. Nor did he advise the parties that he had made a definitive decision to declare a mistrial before announcing it. Because it was not obvious that the court would declare a mistrial without further inquiry of the jury, according to the dissent, the record did not support a finding of implied consent.

Endnotes:

1. See *Allen v. United States*, 164 U.S. 492 (1896).
2. See *People v. O'Rama*, 28 N.Y.2d 270 (N.Y. 1991).

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